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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STEVEN L. SMITH, Cross-defendant and Appellant, v. JENNIFER LESLIE HANCE et al., Cross-complainants and Respondents.	D054295 (Super. Ct. No. 37-2008-00080508-CU-CR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed in part, reversed in part and remanded with directions. Motion for sanctions denied.

Appellant Steven Smith appeals from an order denying his special motion to strike the cross-complaint of respondents Jennifer Hance and Danny Hance under Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation)

statute.[1] The trial court denied the motion on grounds appellant's asserted protected speech or petition activity constituted a pattern of harassment and was therefore illegal as a matter of law. Appellant contends he established that respondents' cross-complaint targets protected communications he had made to government or other official agencies. He argues the court misapplied *Flatley v. Mauro* (2006) 39 Cal.4th 299 to defeat the purposes of section 425.16 and improperly shift to him the burden of showing respondents could not prevail on their cross-complaint. Appellant further contends respondents cannot establish they would prevail on their claim, because all of the targeted communications are absolutely privileged under Civil Code section 47, subdivision (b).

We disagree with these contentions with respect to all but respondents' defamation cause of action, which is necessarily based on communications to governmental agencies and thus arises from protected petitioning activity. As to that cause of action, we hold respondents did not establish a probability of prevailing on their claims. Accordingly, we reverse the order as to respondents' defamation cause of action and affirm the order as to the other causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

This court is, unfortunately, all too familiar with the long history of disputes between the parties to this appeal, which is the third arising from the interactions between brothers Steven and Gregory Smith (collectively the Smiths or separately Gregory and Steven) and respondents, who are the Smiths' neighbors. In the first appeal, we upheld a

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1 See *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8 & fn. 1. All statutory references are to the Code of Civil Procedure unless otherwise indicated.

three-year restraining order in favor of respondents and their family and against the Smiths, barring the Smiths from harassing, attacking, striking, threatening, assaulting, hitting, following or stalking respondents, and also barring them from photographing or videotaping respondents' home and driveway, garage, yard and vehicles parked in front of their home. (*Smith v. Hance* (May 4, 2007, D047471) [nonpub. opn.].) In the second appeal, we affirmed an October 2007 order denying Gregory's motion to dissolve the injunction. (*Hance v. Smith* (March 3, 2009, D051917) [nonpub. opn.].) By the time we issued our second opinion, the restraining order had expired. (*Ibid*.)

Approximately six months before expiration of the restraining order, Gregory filed a verified complaint against respondents alleging causes of action for false imprisonment, false arrest, assault, battery, "trespass to chattel," and intentional and negligent infliction of emotional distress. In June 2008, respondents cross-complained against the Smiths and individuals Gilda Mullette (another neighbor) and Catherine Smith, in part alleging causes of action for breach of contract, civil harassment, invasion of privacy, malicious prosecution, and defamation (under theories of both libel and slander), as well as intentional and negligent infliction of emotional distress.[2]

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2 The trial court sustained without leave to amend Steven's demurrer to respondents' malicious prosecution action on grounds it was time barred. Though respondents attempt to argue on appeal that their action was timely filed, they have not appealed from the trial court's October 17, 2008 order. A sufficient notice of appeal is a prerequisite to our appellate jurisdiction to review that order. (See *Beets v. Chart* (1889) 79 Cal. 185; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.) Absent a notice of appeal, we have no power to review the trial court's order sustaining Steven's demurrer as to that cause of action.

In their cross-complaint, respondents summarize the "crusade of harassment" employed by Mullette and the Smiths in their neighborhood, alleging: "Over the years, they have initiated frivolous lawsuits, been to mediation with at least three families, made countless complaints to the police and Neighborhood Code Compliance Department (NCCD), had neighbors' vehicles towed and ticketed, and left spiteful notes on residents' cars." Respondents allege that in an attempt to end the harassment, they initiated mediation with Mullette in 2000, who ultimately refused to honor the terms of their agreement.

Respondents allege: "Since that time, . . . [the Smiths and] Mullette . . . have used every conceivable public system, including the courts, the police and fire departments, and at least thirteen other separate city administrative offices to harass the Hances in an effort to cause them financial ruin as well as emotional distress. Amongst Mullette and the Smiths' allegations, they have fraudulently accused [Danny] Hance of battery, assault, theft, vandalism, contaminating the environment, and even child abuse." Respondents allege they had witnessed the Smiths taking over one thousand documented photographs of their property and family in an effort to keep them under surveillance, suffered physical threats and harassment from other individuals associated with Mullette, and were the subject of three false complaints to child protective services (CPS), resulting in respondents filing suit against Mullette and Steven in 2003. They allege that following mediation of the matter, respondents, Steven, Mullette and their respective counsel in July 2003 entered into a Memorandum of Understanding (MOU), in part requiring all parties to "comply with all state and local laws, codes and ordinances" and have a JAMS

arbitrator resolve any future alleged violation of the MOU or Settlement Agreement.[3] That MOU was made an order of the court in December 2003.

Respondents allege that only days after receiving a settlement check under the MOU, the photograph-taking resumed. Thereafter, in 2005, Steven sought a restraining order against respondents, who cross-complained and obtained the three-year restraining order against the Smiths. Respondents allege that after a fire destroyed their home in February 2007, they observed Gregory sitting outside their temporary residence and called police. This incident caused respondents to obtain a modification of the restraining order to include a 100-foot stay-away order. Respondents allege that Mullette nevertheless continued to take "countless" photographs in front of both their residence currently under reconstruction and their temporary residence. They allege: "Having been dragged into court by either Mullette or the Smiths fifteen times in the past eighteen months, Hance continues to incur enormous legal fees and continues to address

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3 The parties' MOU, which is an exhibit to respondents' cross-complaint, provides for a dismissal of the action with prejudice and requires that Steven and Mullette pay $18,750 to respondents. We deem the MOU's terms incorporated by reference into the cross-complaint. (E.g., *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 609.) Paragraph 4 of the MOU provides: "The Settlement Agreement to be executed by the parties shall contain mutual non-disparagement/harassment provisions, and shall also contain the following provisions: [¶] (a) All parties shall comply with all state and local laws, codes and ordinances; [¶] (b) The parties shall refrain from trespassing on each other's property; [¶] (c) The Hances and Mullette agree that to the extent they maintain video cameras, the camera angles or line of sight shall extend no further in the direction of the other party's property than the curb line adjoining that property." Paragraph 5 of the MOU provides: "Any alleged future violation of this MOU or the Settlement Agreement shall be resolved by a JAMS arbitrator who shall have the jurisdiction to determine the existence or non-existence of the alleged violation, and discretion to award damages. The prevailing party shall be entitled to recovery of his or her reasonable attorney fees and costs."

complaints from the [San Diego Police Department] and Building Department on a weekly (and sometimes daily) basis during the rebuild of their residence."

In their breach of contract cause of action, respondents further allege that Steven violated the MOU by making "innumerable complaints" and placing "numerous telephone calls and emails" to the NCCD; making defamatory statements about respondents and their company to the San Diego City Council; following Danny Hance to work and confronting his employer; photographing respondents' family, their vehicles and home and submitting them to the NCCD and City Council; making "numerous complaints" to the police and fire departments, City Attorney and City Council offices and other City offices; making a false insurance claim against respondents; and refusing to participate in arbitration at JAMS. Respondents allege "the Smiths have been told repeatedly that all permits and inspections are up to date, but the different city offices continue to receive complaints."

In their cause of action for civil harassment, respondents allege that by these actions, the Smiths engaged and continue to engage in a course of conduct that serves no legitimate purpose and is intended solely to alarm, annoy and harass them, as well as cause them substantial emotional distress. They allege: "[T]he Smiths' actions have not been limited to notes on vehicles, photo-taking and videotaping. . . . [T]he Smiths have (A) initiated multiple frivolous lawsuits, which include six failed TRO complaints between Mullette and the Smiths, along with other failed attempts at criminal convictions made through citizens' arrests; (B) made innumerable false complaints to 15 different city agencies including NCCD, [CPS], Police and Fire Departments, as well as the City

Attorney and local council member's offices; (C) [f]iled a false police complaint against Hance, then provided an incomplete copy to the court along with a letter designed to mislead the court into believing the matter was pending with the City Attorney; [and] (D) made defamatory statements to several City Department heads as well as to the police and political representatives." Respondents' invasion of privacy and emotional distress causes of action incorporate all of these allegations by reference, and they additionally allege as the basis for the invasion of privacy the Smiths' conduct in taking photographs and videotapes and submitting them to various city agencies.

Finally, in their cause of action for defamation/slander, respondents allege that the Smiths made numerous false statements about them to other neighbors, city council representatives, the San Diego Unified School District, city agencies including the NCCD, building department inspectors, the storm water pollution control department, and Danny Hance's employer. Respondents allege the statements are not privileged or if any privilege attached, it was negated by the Smiths' malice.

Steven filed a motion to strike respondents cross-complaint under section 425.16. He asserted that the "principal purpose" of the pleading was to "strike at him" for exercising his right to petition the government, and in retaliation for availing himself "of statutory provided [*sic*] court access for civil harassment." He argued respondents could not show they could prevail because his complaints and his attempt to document them by photographs, even if malicious or fraudulent, were protected under the Civil Code section

47 absolute privilege[4] or time-barred under the relevant statute of limitations. According to Steven, respondents could not maintain their cause of action under the civil harassment statute because his constitutionally protected activity in petitioning the government was expressly excluded from section 527.6's definition of "course of conduct." Steven submitted a declaration in which he stated that his photographs were taken from public streets and sidewalks and depicted matters observable from public right of ways; that he did not enter respondents' property to take them. He averred he took his photographs before May 2005 to document his reports to the City that respondents were storing commercial vehicles in a residential neighborhood and were preparatory to his communications about violations of the law to city agencies. He further stated his complaints to government agencies also took place before May 2005, so that respondents' causes of action based on such complaints were time-barred.

Respondents opposed the motion on grounds their cross-complaint was fundamentally based on Steven's violation of the MOU and the court order incorporating it. They pointed out the MOU was designed to stop the "incessant" complaints to government agencies and require the parties to bring their disputes to JAMS, with the understanding and deterrent that the losing party would pay attorney fees and costs. Respondents argued: "[Steven] knows full well that he contracted to 'redress his

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4 Civil Code section 47 provides in part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, . . ."

grievances' about [respondents] in a single forum — JAMS — and should his complaints prove to be without merit, [respondents] would be 'protected' by having to deal with a single forum, and with the prospect that attorney[] fees could be recovered. For [Steven] to now claim this is a SLAPP action that impairs rights he contracted away is simply baseless. This is a contract action to enforce a breach and his incessant complaints are not privileged nor on an important public issue." Respondents stated that even if Steven's activities were protected, his rights should not trump their equally important constitutional right to privacy. They argued they could nevertheless meet their burden of demonstrating a probability of prevailing on their claims because they could show Steven was engaging in a knowing and willful course of conduct toward them that caused serious alarm, annoyance, or harassment without any legitimate purpose.

Respondents supported their opposition with the declaration of Jennifer Hance, who set out the background of the parties' disputes, and explained that when "[Steven] signed the MOU, he then gave up his rights to complain directly to the different government agencies, and accepted by way of agreement that the forum to hear his alleged complaints would from that point forward be JAMS. He has continued to complain to the City, and refused to initiate his claims in the forum he agreed to — JAMS, all in violation of the MOU/Order. He has done so as a means of harassment and to avoid the right for Hance to be awarded fees and costs due to a clause in paragraph 5 of the MOU/Order that clearly states: 'The prevailing party shall be entitled to recovery of his or her reasonable attorney's fees and costs.' " Jennifer Hance stated that when respondents had last attempted to initiate arbitration of their matters with JAMS in

October 2007, JAMS informed them it had "recused" itself from hearing their case, and directed them to return to superior court, where they filed their cross-complaint.

The court denied Steven's motion, finding sufficient uncontroverted facts showing he had engaged in illegal conduct as a matter of law. Specifically, it ruled that Jennifer Hance's declaration, combined with the arbitrator's rulings and this court's decision, evidenced a pattern of conduct on Steven's part designed to harass respondents and constituting a violation of section 527.6. Steven filed this appeal.

DISCUSSION

I. *Motion to Augment Record*

Shortly before filing their brief on appeal, respondents moved to augment the appellate record with (1) the reporter's transcript of the trial court's decision in San Diego Superior Court Case No. GIC 847788; (2) the January 6, 2007 recusal letter from JAMS; and (3) our May 4, 2007 opinion in *Smith v. Hance*, *supra*, D047471. In an accompanying declaration, respondent Jennifer Hance states the documents are needed to support their claims and to provide background of the case. Respondents argue this case is complex and "involving years of litigation, and the issues can only be fully understood with the documents cited to in the respondent's brief." (*Ibid*.) Steven opposes the request on both procedural and substantive grounds.

Under California Rules of Court, rule 8.155(a)(1), at any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include any document filed or lodged in the case in superior court. Augmentation of the record is not a matter of right and lies within the appellate court's discretion. (*Russi v. Bank of*

America (1945) 69 Cal.App.2d 100, 102.) Here, respondents do not state that any of the documents attached to their request were before the superior court when it considered Steven's section 425.16 special motion to strike, or that the items were mistakenly omitted from the appellate record.

With respect to the reporters' transcript and January 6, 2007 letter from JAMS, there is no indication they were part of the record considered by the trial court in ruling on Steven's motion. We therefore deny respondents' request to augment the record on appeal with these items. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Augmentation does not function to supplement the record with materials not before the trial court"]; *In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209 ["[A]ugmentation may be used only to add evidence that was mistakenly omitted when the appellate record was prepared"]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 ["As a general rule, documents not before the trial court cannot be included as a part of the record on appeal"].) Our conclusion would not change even if we were to construe respondents request as one asking this court to take new evidence on appeal. That power is to be used " 'sparingly,' " and is only appropriately exercised when required by " 'the interests of justice.' " (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1257, 1259; see also *Vons Companies*, at p. 444, fn. 3 [requiring exceptional circumstances to take evidence under Code of Civil Procedure section 909].) Respondents have not shown exceptional circumstances exist.

As for our prior opinion in *Smith v. Hance, supra*, D047471, the trial court's order indicates it had that opinion before it when reaching its decision. Even if that were not

the case, we may still consider it. On our own motion we take judicial notice of that opinion as it involves a related case having the same parties and some of the same underlying conduct identified in the cross-complaint at issue here. (Evid. Code, §§ 452, subd. (d) [judicial notice may be taken of court records], 459; see *In re Christy L.* (1986) 187 Cal.App.3d 753, 755 [court may take judicial notice of prior unpublished opinion in related appeal].) This court's unpublished opinion in case No. D047471 provides an account of the prior procedural history of the parties' disputes, and our holding in that case — that the Smiths' photograph taking of respondents and their family satisfied the elements of the civil harassment statute, section 527.6 — is directly relevant to some of the conduct underlying respondents' challenged cross-complaint in the present matter.

II. *Section 425.16 Special Motion to Strike*

A. *Legal Principles*

The Legislature enacted section 425.16 to deter lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." ' " (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 312.) To achieve the goal of encouraging participation in matters of public significance, the statute must be construed broadly. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 195.)

A court engages in a two-step process to determine whether an action is subject to a section 425.16 special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*); *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) "First, the court decides whether the defendant [or cross-defendant] has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)[.]' [Citation.] If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier*, at p. 88.) The cause of action must satisfy both prongs — it must arise from protected speech or petitioning *and* lack even minimal merit — to be stricken under the statute. (*Id.* at p. 89; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569.)

As to the first step of the section 425.16 analysis, a cause of action is subject to a special motion to strike if the cause of action is one "arising from any act . . . in furtherance" of the defendant's "right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ." (§ 425. 16, subd. (b)(1).) Subdivision (e) of section 425.16 sets out four categories of activities that are "in furtherance of" a defendant's free speech or petition rights; relevant here are those acts set forth in the first two categories: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law"; and "(2) any written or oral statement or writing made in connection

with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subds. (e)(1), (e)(2).)

We independently review the order denying Smith's section 425.16 motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App. 4th 1385, 1396.) We consider the pleadings, and supporting and opposing affidavits upon which the liability or defense is based. However, we neither weigh credibility nor compare the weight of the evidence; rather, we accept as true the evidence favorable to respondents and evaluate Steven's evidence only to determine if he has defeated that submitted by respondents as a matter of law. (*Soukup*, at p. 269, fn. 3.)

B. *Threshold Showing*

Acknowledging that he must meet a threshold burden on his section 425.16 motion to strike, Steven contends he did so by showing that respondents' cross-complaint "targeted, at least in part, protected communications to governmental agencies." He repeats his arguments made below: that "[c]learly" the "principal purpose" of the pleading was to strike at him for exercising his right to petition the government, and in retaliation for availing himself "of statutory provided [*sic*] court access for civil harassment."

There are several flaws with Steven's argument. First, he incorrectly characterizes his initial burden. He states a defendant filing a section 425.16 motion to strike must simply "show 'act[s] in furtherance of a persons' right of petition or free speech under the United States or California Constitution.' " In fact, such a defendant must do more than

simply show the existence of such acts, he or she must show the cause of action *arises from* such an act. (§ 425.16, subd. (b)(1); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) We explained more fully in *Freeman v. Schack* (2007) 154 Cal.App.4th 719: " '[T]he statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . . " ' " (*Id*. at p. 727, quoting *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) We further explained, "It is 'the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' " (*Freeman*, at p. 727, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

Accordingly, in order to make out the threshold showing that respondents' causes of action arise from protected activity, it is not sufficient for Steven to show that the causes of action were filed after he engaged in protected activity, or that the cross-complaint was "triggered by," or was filed "in response to, or in retaliation for," his exercise of free speech rights. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 76-78;

accord, *Navellier*, *supra*, 29 Cal.4th at p. 89; *Freeman v. Schack*, *supra*, 154 Cal.App.4th at p. 730; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537-1538.) However, this is the only argument Steven made below in his motion. Steven pointed to respondents' various allegations concerning his complaints and statements to various public entities, stating they are "the petition rights that cross-defendant is being retaliated against in the underlying cross-complaint. . . ." He argued respondents' cross-complaint "in each and every cause of action targets communications allegedly made by cross-defendant . . . to various executive, enforcement or law enforcement agencies . . . [¶] These types of 'complaints' are prototypical of the type of petitioning activity that are given the highest constitutional protection. . . . In this case unquestionably the cross-complaint targets communications to official agencies that are designed to prompt action."

Second, Steven's discussion as to whether he met his threshold burden ignores respondents' allegations of misconduct *apart from* his complaints to official or governmental agencies. His analysis thus does not meaningfully address the pertinent question: whether the principal thrust of the conduct underlying respondents' causes of action, or the " 'activity that gives rise to [Steven's] asserted liability' " (*Freeman v. Schack*, *supra*, 154 Cal.App.4th at p. 732) involves protected activity. While reports to government entities, including police, are unquestionably protected activity (see *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1506, 1511; *Siam v. Kizilbash*, *supra*, 130 Cal.App.4th at pp. 1567, 1569-1570), respondents have persuasively shown that their

cross-complaint is not based merely on statements made by Steven in furtherance of his protected rights to petition the government.

We cannot ignore respondents' allegations that Steven's course of conduct in photographing their home and family and following Danny Hance to work was the subject of a civil harassment restraining order. We upheld that order on appeal in *Smith v. Hance, supra*, D047471, holding the Smiths' photograph taking met the criteria for civil harassment under section 527.6. Nor do we disregard their allegations that Steven's continued actions and complaints against them are made solely in an effort to harass and annoy them, with no legitimate purpose and in direct violation of the MOU. We conclude the substance of respondents' causes of action are based on obligations imposed by the MOU. Under its terms, if Steven believes respondents violated any local laws, codes and/or ordinances, he is not to bring such violations to the attention of the relevant governmental authorities who would normally address them, but to initiate arbitration with JAMS for an arbitrator to resolve the alleged violations. His failure to comply with the MOU's requirement to arbitrate disputes is not protected petitioning activity.

Our high court in *Flatley v. Mauro* said: "[I]t would eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's mere assertion that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing where it could be conclusively shown that the defendant's underlying activity was illegal and not constitutionally protected. While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute, clearly the statute envisions that the courts do more than simply

rubber stamp such assertions before moving on to the second step." (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 317.) Though Steven correctly asserts on appeal that his burden requires that he only make a *prima facie* case (see *Flatley v. Mauro,* at pp. 314, 317), he has not met even that burden with his conclusory arguments.[5] Of course, it is of no moment that we resolve Steven's motion on grounds different than those considered by the trial court, since our review is de novo and we review the trial court's result, not its rationale. (See *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 110; *Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.) We express no opinion on the merits of the trial court's reasoning. Based on the inadequacy of Steven's arguments and showing as to his threshold burden alone, we may uphold the trial court's order denying his section 425.16 special motion to strike as to respondents' breach of contract, civil harassment, invasion of privacy and intentional and negligent infliction of emotional distress causes of action. Under these circumstances, the burden of showing a probability of prevailing on these causes of action never shifted to respondents. Accordingly, we need not discuss

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[5] In particular, Steven does not acknowledge respondents' allegations about the MOU, the obligations it imposed on him to arbitrate alleged violations with JAMS, and its repeated breaches by the Smiths. Respondents' cause of action for breach of contract directly arises out of Steven's refusal to arbitrate his claims of illegal or unlawful activity with JAMS. Their causes of action for civil harassment, invasion of privacy, and infliction of emotional distress arise from Steven's photographing activities, as well as Steven's disregard of the MOU. Steven does not address recent authority holding that when the gist of a cause of action is that the defendants did something wrong by breaching a settlement agreement (as the MOU here), the cause is not based on protected petitioning activity. (*Applied Business Software, Inc. v. Pacific Mortgage Exchange Inc.*(2008) 164 Cal.App.4th 1108, 1118.) Nor does Steven argue based on *Navellier v. Sletten*, *supra*, 29 Cal.4th 82 that his entry into the MOU somehow involves a matter within the scope of section 425.16, subdivision (e)(2).)

the second prong of section 425.16. (*Navellier, supra,* 29 Cal.4th at pp. 88-89; *Applied Business Software, Inc. v. Pacific Mortgage Exchange Inc.*, *supra*, 164 Cal.App.4th at pp. 1118-1119.)

We reach a different conclusion, however, as to respondents' defamation cause of action. Respondents allege Steven engaged in defamatory conduct insofar as he falsely impugned Hance's "competence, integrity and professional skill" or claimed that respondents were "criminals" or engaged in "illegal business practices" by "consistently violat[ing] city laws and ordinances." They allege such false statements were made not only to other neighbors, but also to city council representatives, the San Diego Unified School District, and city agencies including the NCCD, building department inspectors, and the storm water pollution control department. The asserted activity giving rise to Steven's liability for defamation necessarily is the nature and content of Steven's complaints to government agencies; those complaints are "[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim." (*Martinez v. Metabolife Internat., Inc.*, *supra,* 113 Cal.App.4th at p. 189.) Because the reports to governmental agencies form a substantial part of the factual basis for the defamation cause of action, it is subject to section 425.16 even though it is also based on alleged slanderous statements made to neighbors. (Accord, *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 104.) Thus, we conclude respondents' defamation cause of action arises from protected activity within the meaning of section 425.16.

C. *Probability of Prevailing on Defamation Cause of Action*

Because respondents' defamation cause of action against Steven arises from protected petitioning activities, we turn to the second prong of the section 425.16 analysis: whether respondents have established a probability of prevailing on that cause of action.

" 'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must " 'state[ ] and substantiate[ ] a legally sufficient claim.' " [Citation.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' " (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19-20.)

Slander is "a false and unprivileged publication, orally uttered, . . . which [inter alia] [¶] . . . [¶] . . . [t]ends directly to injure [a person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural

tendency to lessen its profits; [or] [¶] . . . [¶] . . . [w]hich, by natural consequence, causes actual damage." (Civ. Code, § 46; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153.) To prevail on a defamation cause of action, a plaintiff must prove "the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179; *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1132.) " 'Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the "public" at large; communication to a single individual is sufficient.' " (*Raghavan*, at p. 1132.)

Here, Steven argues respondents cannot establish a probability of prevailing on their claims because all of the challenged communications are petition activities that are absolutely privileged under Civil Code section 47, subdivision (b).[6] However, Steven

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6 " 'Section 47, subdivision [b], provides for an absolute privilege with regard to statements made "in any . . . official proceeding authorized by law." . . . [A] communication concerning possible wrongdoing, made to an official governmental agency such as a local police department, and which communication is designed to prompt action by that entity, is as much a part of an "official proceeding" as a communication made after an official investigation has commenced. [Citation.] After all, "[t]he policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing." [Citation.] In order for such investigation to be effective, "there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate under the circumstances. . . . [¶] The importance of providing to citizens free and open access to governmental

disregards respondents' allegations that his allegedly defamatory communications were made to "many neighbors" as well as various government entities. In particular, they allege "the Smiths have spoken to many neighbors about Hance. The plaintiffs/cross-defendants claim that the Hances are criminals, that they engage in harassing and annoying behavior, and that they constantly threaten them. They have made it a point to slander Hance's company, making similar false allegations regarding illegal business practices, and asserting that the business consistently violates city laws and ordinances." Respondents allege the statements were false and known to be false, and made maliciously with the intent to injure them in name and reputation, or they were made in conscious disregard for their truth. "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann v. Quality Old Time Service, Inc., supra*, 120 Cal.App.4th at p. 106.)

Nevertheless, to establish a probability of prevailing, respondents cannot simply rely on their pleadings, even if verified. (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 735.) They were required to establish with competent, admissible evidence each of the elements of slander, including (1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss. (*Ringler Associates Inc. v. Maryland Casualty Co., supra*, 80 Cal.App.4th at p.

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agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential." [Citation.] And, since the privilege provided by section 47, subdivision [b], is absolute, it cannot be defeated by a showing of malice." (*Kashian. Harriman* (2002) 98 Cal.App.4th 892, 926-927.)

1179; *Raghavan v. Boeing Co., supra*, 133 Cal.App.4th at p. 1132.) Jennifer Hance's declaration does not suffice. In it, she states only: "We are likely to prevail in our causes of action here because this is at bottom a breach of contract matter, not a SLAPP issue." She asserts that under the MOU, Smith gave up his rights to complain to government agencies and arbitrate matters with JAMS, but refuses to initiate arbitration with JAMS as a means of harassment. Jennifer Hance does not attempt to provide evidence establishing the publications to neighbors, the falsity of the publications, or actual pecuniary damage. Given the absence of competent, admissible evidence, we conclude respondents failed to demonstrate a probability of prevailing on the merits of their defamation cause of action.

III. *Request for Attorney Fees and Sanctions*

Steven requests an award of attorney fees and costs incurred in bringing his special motion to strike below and on appeal. Respondents likewise request an award of attorney fees for defending Steven's motion under the MOU and Civil Code section 1717. They also seek sanctions against Steven and his counsel under California Rules of Court, rule 8.276(a), as well as Code of Civil Procedure sections 907, 128.5 and 425.16 for undertaking an appeal that is completely without merit.

Section 425.16 provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th at 1122, 1131 [where a SLAPP defendant successfully brings a special motion to strike, an award of attorney fees is mandatory].) A defendant such as Steven who achieves only a partial success on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion

were so insignificant that the party did not achieve any practical benefit from bringing the motion. (See *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 338; *Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 426; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1446 [where results of motion are minimal and insignificant, a trial court is justified in finding a defendant should not recover fees under section 425.16].) Such a defendant may be entitled to fees and costs incurred on the motion to strike, subject to reduction for those claims as to which the motion was not successful and the degree to which the successful and unsuccessful claims are legally and factually related. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1016-1020; *Layfayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383-1384 [section 425.16 fees limited to those incurred on motion to strike].) Even where the work on the successful and unsuccessful claims is overlapping, "the court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Mann*, 139 Cal.App.4th at p. 340, citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 440.) "The determination whether a party prevailed on an anti-SLAPP motion lies within the broad discretion of a trial court." (*Mann*, at p. 340.)

We express no opinion as to whether, on remand, Steven would be entitled to attorney fees. We leave it to the trial court to determine that question. (See *Mann v. Quality Old Time Service, Inc.*, *supra*, 139 Cal.App.4th at p. 340; *Morrow v. Los Angeles Unified School Dist.*, *supra*, 149 Cal.App.4th at p. 1446; *Phelps v. Stostad* (1997) 16

Cal.4th 23, 33, fn. 7.) On remand, the trial court is to determine the amount of a reasonable fee award upon Steven's properly substantiated request.

Because we reverse the trial court's order as to Steven's defamation cause of action, we are compelled to deny respondents' motion for sanctions under section 907. "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Because Steven's appeal was not "totally and completely without merit" sanctions are not warranted. (See *id*. at p. 651 [sanctions should be "used most sparingly to deter only the most egregious conduct"].)

DISPOSITION

The order denying the motion to strike is reversed as to respondents' sixth cause of action for defamation (slander) against Steven. The order is affirmed as to the first (breach of contract) second (civil harassment), third (invasion of privacy), seventh (intentional infliction of emotional distress) and eighth (negligent infliction of emotional distress) causes of action. The trial court is directed to enter a new order granting the motion to strike as to the sixth cause of action for defamation, and denying the motion to strike as to the remaining causes of action. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.